UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

MINNESOTA LAWYERS MUTUAL INSURANCE COMPANY	)	
Plaintiff,	)	
v.	)	**Case No.: 1:08cv1020 LO/TCB**
ANTONELLI, TERRY, STOUT & KRAUS, LLP *et al.*,	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Defendants Antonelli, Terry, Stout & Kraus, LLP (the "Antonelli law firm") and Donald E. Stout ("Stout") (collectively, the "Insureds") move pursuant to Fed. R. Civ. P. 56 and Local Rule 56 for summary judgment against plaintiff Minnesota Lawyers Mutual Insurance Company ("MLM"), declaring that MLM has a duty to defend the Insureds in a pending action in Florida state court, *Ferguson, et al. v. Stout, et al.*, Case No. 08-09767CA40 ("*Ferguson* action").

I. Introduction

MLM filed this action, seeking a declaration that it had neither a duty to defend nor to indemnify the Insureds in the *Ferguson* action. On December 15, 2008, this Court stayed MLM's action finding that, to resolve MLM's claims, facts being litigated in the

Ferguson action would have to be resolved. MLM filed a notice of appeal, arguing that there would be no entanglement between the two actions because this declaratory judgment action was based solely upon the allegations of the complaints filed in the *Ferguson* action, not the facts being litigated there. As the Fourth Circuit stressed:

> [C]ounsel representing MLM stated before the court that [i]f it is not set forth in the pleadings so clearly that it's outside the policy, then we have a duty to defend because the duty to defend means that there is a potentiality based on the pleadings for coverage under the policy. And that is the start and end of the inquiry. We are not allowed, we are not permitted as a matter of law to go beyond that.

See Affidavit of Brian J. Gerling In Support of Defendants' Motion for Summary Judgment ("Gerling Aff.") Ex. A at 10. Based upon this argument and relying upon MLM's representation, the Fourth Circuit reversed the stay and found that this action might proceed.

MLM plainly has a duty to defend the Insureds in the *Ferguson* action. The second and now third amended complaint filed in that action contains allegations of a purported attorney-client relationship and the alleged rendering of legal advice, which is covered by the MLM policy. For instance, according to both the second and third amended complaints, the Antonelli law firm, while acting as counsel for Telefind Corporation and certain investors of Telefind, devised legal strategies that, when followed, purportedly deprived the *Ferguson* plaintiffs (or predecessors) of alleged interests in certain patents. *See* Gerling Aff. Ex. B at ¶96; Ex. C at ¶ 104.

Under Virginia law, if there are any or even a single allegation in the complaint on which either the Antonelli law firm or Stout could be found liable for damages, then MLM must defend. *See Parker v. Hartford Fire Ins. Co.*, 222 Va. 33, 35, 278 S.E.2d

803, 804 (1981) (even if the complaint alleges some allegations of non-covered conduct, if there are alleged facts and circumstances, some of which, if proved, would fall within a risk covered by the policy, the insurer has a duty to defend). It necessarily follows that, as a matter of law, MLM has a duty to defend.

II. Statement of Undisputed Facts

Pursuant to Local Civil Rule 56(B), the Insureds submit the following list of material facts as to which they contend there is no genuine issue.

A. The Florida Litigation

On or about July 25, 2008, the Florida plaintiffs[1] filed a second amended complaint in the *Ferguson* action. The *Ferguson* action was brought by a group of plaintiffs alleging that they, or their predecessors, had developed or had an ownership interest in certain wireless email technology, which was ultimately used to develop the Blackberry handheld device.[2] With their second amended complaint, the *Ferguson* plaintiffs added the Antonelli law firm as a defendant in the Florida litigation, alleging that through Mr. Stout it had provided legal services for which defendants were liable. *See* Gerling Aff. Ex. B. The second amended complaint contained the following causes of action against the Antonelli law firm and/or Stout: (1) breach of fiduciary duty; (2)

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1 The Florida plaintiffs are Adrienne Andros Ferguson, individually and on behalf of the Estate of Andrew A. Andros, Emily J. Andros, individually and on behalf of the Estate of Andrew A. Andros, Julia Lynn Andros, individually and on behalf of the Estate of Andrew A. Andros, Penelope J. Andros, individually and on behalf of the Estate of Andrew A. Andros, John S. Richards, Abbas I. Y ousef, Mirsul Investments, S.A and Importechno International, Inc.

2 The Antonelli Law Firm and Mr. Stout deny the allegations made by the Florida plaintiffs and are defending themselves against these allegations in the Florida state court.

breach of contract; (3) fraud; (4) civil conspiracy; (5) unjust enrichment; (6) promissory estoppel; and (7) declaratory judgment.

The Antonelli law firm and Stout, along with certain other defendants, moved to dismiss the second amended complaint in the *Ferguson* action. On or about August 26, 2009, the Florida court dismissed the fraud and civil conspiracy counts contained in the second amended complaint. *See* Gerling Aff. Ex. D. Thereafter, on or about September 10, 2009, the Florida plaintiffs filed a third amended complaint, which except for eliminating the fraud and civil conspiracy claims is materially the same with regard to the allegations against the Antonelli law firm and Stout.[3] *See* Gerling Aff. Ex. C.

The first count brought by the *Ferguson* plaintiffs against the Insureds is labeled "Breach of Fiduciary Duty," and includes a legal malpractice claim against Stout and the Antonelli law firm. That count alleges that

> in providing ... legal advice, Stout traded upon his relationship of trust and confidence with Andy Andros and the Richards Investors. Stout and his Antonelli partners breached that relationship of trust and confidence when they put their own interests above those of Andy Andros and the Richards Investors ....

See Gerling Aff. at Ex. B, Count I at ¶ 96; Ex. C, Count I at ¶ 104. The *Ferguson* plaintiffs also allege that, in 1987, the Antonelli law firm and Mr. Stout were retained to provide legal services to the Telefind Corporation and certain of its investors. *See* Gerling Aff. Ex. B at ¶ 29; Ex. C at ¶ 32. These legal services, the *Ferguson* plaintiffs allege, were funded primarily by a group of investors in Telefind, the "Richards

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[3] The Florida Court also dismissed a count for knowing participation in breach of fiduciary duty; however, that count was not alleged against either the Antonelli law firm or Stout.

Investors." *See* Gerling Aff. Ex. B at ¶ 30; Ex. C at ¶ 33. According to the *Ferguson* plaintiffs, to protect the Telefind Corporation's assets, Stout, as a partner of the Antonelli law firm, "devised a legal strategy that he told [the *Ferguson* plaintiffs] would legally protect the Telefind investors' interest in" this wireless email technology. *See* Gerling Aff. Ex. B at ¶ 52; Ex. C at ¶ 55. The strategy allegedly involved distinguishing patents relating to the wireless email technology from patents relating to a paging technology, which, the *Ferguson* plaintiffs allege, the Antonelli law firm advised was a distinction that could be made under United States patent law. *See* Gerling Aff. Ex. B at ¶ ¶ 52-56; Ex. C at ¶ ¶ 55-59. According to the *Ferguson* plaintiffs, in order to "implement this legal strategy," relying upon the advice from Mr. Stout and the Antonelli law firm, the Richard Investors and others did not "document[] any direct ownership interest in the Wireless Email Technology ...," in the hope that they could protect it from being acquired by Telefind's creditors. *See* Gerling Aff. Ex. B at ¶ 57; Ex. C at ¶ 60.

The *Ferguson* plaintiffs allege that some time after they were given this legal advice, NTP, Inc. was formed and patents for their wireless email technology were transferred to that corporation. *See* Gerling Aff. Ex. B at ¶ 68; Ex. C at ¶ 71. Subsequently, NTP, Inc. brought a claim against Research in Motion, Ltd. for infringement of these patents. When that case was settled for $613 million, the *Ferguson* plaintiffs allege, they had no documented interest in the patents because they allegedly relied upon Mr. Stout's and the Antonelli law firm's advice. Consequently, the *Ferguson* plaintiffs contend they were unable to share in the settlement and therefore seek to recover hundreds of millions of dollars from the Antonelli law firm and Stout. *See* Gerling Aff. Ex. B at ¶ ¶ 81-83; Ex. C at ¶ ¶ 85-86, 88.

B. MLM's Insurance Contract

MLM issued a Lawyers Professional Liability Policy, number 740506 ("Policy"), to the Antonelli law firm that covers the firm and its partners, including Stout. *See* Gerling Aff. Ex. E. The Policy obligates MLM to:

> pay all sums up to the limit of [MLM's] liability, which the INSURED may be legally obligated to pay as DAMAGES due to any CLAIM:
>
> (1) arising out of any act, error or omission of the INSURED or a person for whose acts the INSURED is legally responsible; and
>
> (2) resulting from the rendering or failing to render PROFESSIONAL SERVICES while engaged in the private practice of law ....

Id. at Form MLM-2000 (4-05) (p. 1 of 7). The Policy provides that there is a $5,000,000 limit and a $50,000 deductible applicable to the *Ferguson* plaintiffs' claims. The amount sought by the *Ferguson* plaintiffs is well in excess of the limit.

The MLM policy also contains exclusions on which MLM relies. The first exclusion provides that the policy does not afford coverage for:

> (1) any CLAIM for DAMAGES arising out of the dishonest, ... or deliberately fraudulent act, error or omission of the INSURED;
>
> ***

Id. at Form MLM-2000 (4-05) (p. 3 of 7).

MLM also relies on Exclusion 3, which provides in relevant part:

> ***
>
> (3) any CLAIM arising out of PROFESSIONAL SERVICES rendered by any INSURED in connection with a business enterprise:
>
> (a) owned in whole or in part;

> (b) controlled directly or indirectly; or
>
> (c) managed
>
> By any INSURED, and where the claimed DAMAGES resulted from conflicts of interest with the interest of any client or former client or with the interest of any person claiming an interest in the same or related business enterprise.

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Id. at Form MLM-2003 VA (4-05) (p. 3 of 8).

The MLM policy also contains a "Specific Entity Exclusion Endorsement" that provides:

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> Any CLAIM resulting from any act, error or omission arising out of rendering or failing to render PROFESSIONAL SERVICES to or on behalf of the following individual(s), business enterprise(s) or organization(s):
>
> NTP, Incorporated

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Id. at Form MLM-48 (7-03).

C. MLM's Coverage Position and Declaratory Judgment Action

Although the Antonelli law firm and Mr. Stout deny the allegations of the *Ferguson* plaintiffs, because the second amended complaint includes allegations that these plaintiffs suffered damages resulting from the Antonelli law firm and Stout "rendering ... professional services while engaged in the private practice of law," *see* Gerling Aff. Ex. B at ¶ 96, in the fall of 2008 the Antonelli law firm and Stout promptly provided notice to MLM and requested that it fund their defense. Upon receiving this notice, rather than protecting its insureds, MLM responded by accusing the Antonelli law firm and Stout of fraud and threatening to seek rescission of the policy. *See* Gerling Aff.

Ex. F. And, instead of treating these accusations as a private matter between an insurer and insured, MLM forwarded a copy of its allegations to the *Ferguson* plaintiffs. *Id.*

The Antonelli law firm and Stout responded by objecting to MLM's conduct and requesting a meeting at which the parties might discuss an appropriate resolution of any disagreements about MLM's coverage obligations. *See* Gerling Aff. Ex. G. MLM rejected any compromise and filed its declaratory judgment action in the United States District Court for the Eastern District of Virginia, seeking a declaration that MLM had no duty to defend and no duty to indemnify the Antonelli law firm and its partner against the allegations made in the *Ferguson* action. *See* Gerling Aff. Ex. H.

MLM's declaratory judgment action was based on MLM's contention that the *Ferguson* action failed to allege "professional services" and that: (1) the fraud exclusion under the MLM policy is a complete bar to coverage; (2) the business enterprise exclusion under the MLM policy is a complete bar to coverage; and (3) the "Specific Entity Exclusion" endorsement concerning NTP, Inc. is a complete bar to coverage. *See* Gerling Aff. Ex. H.[4] However, the allegations of MLM' s complaint contradict the specific allegations included in the second, and now third, amended complaint. For example, plaintiffs have eliminated their fraud claim in the third amended complaint so that the fraud exclusion does not even arguably apply. *Compare* Gerling Aff. Ex. B at Count IV and Ex. C at Count IV. Moreover, even though the *Ferguson* plaintiffs alleged that NTP, Inc. was not even formed until substantially after this advice was rendered, MLM nonetheless contended that underlying plaintiffs sought to recover for advice that was rendered to NTP, Inc. *See* Gerling Aff. Ex. B at ¶ 68; Ex. C at ¶ 71. For these reasons, and because MLM's declaratory judgment action had forced the Antonelli law firm and Mr. Stout to pay for litigation on two fronts, they moved to dismiss or stay MLM's declaratory judgment action. This Court granted their motion. *See* Gerling Aff. Ex. I.

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[4] Although MLM also contends that coverage should be barred only with regard to Stout based on late notice, in order to succeed on such a defense as a complete bar to coverage under Virginia law, MLM must demonstrate that Stout's breach was "substantial and material," which is a question of fact. *See N. River Ins. Co. of N.Y. v. Gourdine*, 205 Va. 57, 63, 135 S.E.2d 120, 124 (1964) (the fact finder must consider three factors to determine if coverage is barred based on late notice: (1) the reasonableness of the delayed notice under the circumstances, (2) the amount of prejudice suffered by the insurer as a result of the delay, and (3) the length of time that elapsed before notice was given). As such, because the duty to defend is broader than the duty to indemnify, and because MLM is not permitted to look outside the allegations of the complaint and the policy itself to determine the duty to defend, it follows that MLM must afford a defense to Stout until it could prove, if ever, that Stout's purported breach was "substantial and material."

MLM appealed. *See* Gerling Aff. Ex. J. The Fourth Circuit ultimately reversed and remanded this matter back to this court ruling that there need not be actual factual findings made with regard to the allegations set forth in the complaint in the *Ferguson* action because:

> the district court is bound by Virginia law to take the pleadings in the state suit as true and apply those against the insurance policy. Essentially, this task involves the interpretation of contractual language and nothing more.

See Gerling Aff. Ex. A at 11.

Using these guidelines, even though the Antonelli law firm and Stout deny such allegations and successfully dismissed portions of the second amended complaint in the *Ferguson* action, there are nonetheless allegations of a purported attorney-client relationship and that legal advice was purportedly provided to the *Ferguson* plaintiffs. *See* Gerling Aff. Ex. B at ¶ 96; Ex. C at ¶ 104. If taken as true, then, these allegations fall squarely within the coverage under the MLM policy for liability "arising out of an act of [the Antonelli law firm and Stout] resulting from the rendering [of] professional services while engaged in the private practice of law ...." *See* Gerling Aff. Ex. E at Form MLM-2000 (4-05) (p. 1 of 7). It follows that MLM's contention that it does not have a defense obligation to its insureds must fail.

III. Argument

A. Legal Standard

1. Summary Judgment Standard

Fed. R. Civ. P. 56 provides that summary judgment will be granted where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See also French v. Assurance Co. of Am.*, 448 F.3d 693, 700 (4th Cir. 2006) ("[The] [s]ummary judgment procedure is properly regarded not as a disfavored procedural short cut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'"); *W. Am. Ins. Co. v. Johns Bros., Inc.*, 435 F. Supp. 2d 511, 513, (E.D. Va. 2006) (with regard to the insurance coverage context, "[r]esolution ... through a grant of summary judgment is 'especially appropriate ... because the construction of insurance contracts is a legal question well suited for resolution by the court.'").

In this case, MLM filed a complaint seeking a declaration that it has no duty to defend or indemnity obligation to the Antonelli law firm and Stout under its insurance policy solely in connection with the underlying *Ferguson* action. Under the Fourth Circuit's ruling, whether MLM has a duty to defend is determined solely by the allegations of the underlying complaint in the *Ferguson* action. As demonstrated below, the allegations of the *Ferguson* plaintiffs undeniably fall squarely within the coverage afforded under the MLM policy. As such, summary judgment in favor of the Antonelli law firm and Stout is appropriate.

2. Duty To Defend

Virginia has adopted the "Eight Corners rule" to determine whether an insurer has a duty to defend. This rule is a combination of the "Exclusive Pleading Rule" and the "Potentiality Rule." *Bohreer v. Erie Ins. Group*, 475 F. Supp. 2d 578, 584 (E.D. Va. 2007). The "Exclusive Pleading Rule" requires that courts determine the insurance company's duty to defend "solely by the claims asserted in the pleadings," while the "Potentiality Rule" extends the "Exclusive Pleading rule" and mandates that if there is any "potentiality" that the plaintiff's allegations may state a claim covered by the insurance policy, then the insurance company must provide a defense to its insured. *America Online, Inc. v. St. Paul Mercury Ins. Co.*, 207 F. Supp. 2d 459, 465 (E.D. Va. 2002) (citations omitted).

Under these rules, the insurer has a duty to defend its insured "when the underlying complaint alleges liability that 'potentially or arguably' is covered by the policy." *Penn-Am. Ins. Co. v. Mapp*, 461 F. Supp. 2d 442, 456-57 (E.D. Va. 2006) (quoting *Penn-Am. Ins. Co. v. Coffey*, 368 F.3d 409 (4th Cir. 2004). In other words, the duty to defend "arises whenever the complaint [against the insured] alleges facts and circumstances, *some of which would, if proved*, fall within the risk covered by the policy." *Capitol Envtl. Servs. v. N. River Ins. Co.*, 536 F. Supp. 2d 633, 640 (E.D. Va. 2008) (citing *Va. Elec. & Power Co. v. Northbrook Prop. & Cas. Ins.*, 252 Va. 265, 475 S.E.2d 264, 265 (1996) (quoting *Lerner v. Safeco*, 219 Va. 101, 245 S.E.2d 249, 251 (1978)).

Virginia law is also well-settled that "[t]he insurer is relieved of a duty to defend only when it clearly appears from the initial pleading the insurer would not be liable under the policy for *any* judgment based upon the allegations." *Capitol*, 536 F. Supp. 2d at 641; *Fuisz v. Selective Ins. Co. of Am.*, 61 F.3d 238, 242 (4th Cir. 1995) ("[A]n insurer is excused from its duty to defend the insured only where the complaint against the insured clearly demonstrates no basis upon which the insurer could be required to indemnify the insured under the policy."). "If coverage is in doubt, the insurance company must defend." *Am. & Foreign Ins. Co. v. Church Sch. in the Diocese of Va.*, 645 F. Supp. 628, 631 (E.D. Va. 1986). As these cases illustrate, if there is a single allegation in the *Ferguson* complaint that is "arguably" or "potentially" covered under the MLM insurance policy, then MLM must defend its insured.[5]

B. The Complaint Allegations Trigger MLM's Duty To Defend

The *Ferguson* plaintiffs assert several allegations which can be read to be purported attorney errors and omissions — the very kind of risk covered by the MLM policy. And because under Virginia law there need only be a single potentially covered allegation in order to trigger an insurer's duty to defend its insured, there can be no legitimate dispute that MLM must afford the Antonelli law firm and Stout with a defense.

5 Yet another reason for the broad expanse of the duty to defend is a direct consequence of the fact that under a liability insurance policy the insurer has offered and the insured has purchased "litigation" insurance to defend the insured against a lawsuit, even if the claims of which are frivolous. *See, e.g., Brohawn v. Transamerica Ins. Co.*, 276 Md. 396,409-410, 347 A.2d 842 (1975) ("[t]he promise to defend the insured, as well as the promise to indemnify, is the consideration received by the insured for payment of the policy premiums. Although the type of policy here considered is most often referred to as liability insurance, it is 'litigation insurance' as well, protecting the insured from the expense of defending suits brought against him.")

1. The Underlying Complaints Allege Purported Errors and Omissions While Rendering "Professional Services"

The second and now third amended complaint unquestionably includes allegations that, if true, would be covered by the MLM policy.[6] The *Ferguson* plaintiffs allege that in 1987 Telefind retained the services of the Antonelli law firm and attorney Stout, (Gerling Aff. Ex. B at ¶ 29; Ex. C at ¶ 32); that Stout developed a *legal* strategy to protect the Telefind investors' interest in certain assets (Gerling Aff. Ex. B at ¶ 52; Ex. C at ¶ 55); and that in May 1991 this *legal* strategy was implemented (Gerling Aff. Ex. B at ¶ 59; Ex. C at ¶ 62). In addition, Count I in each of the complaints is identical and unequivocally seek damages from the Antonelli law firm and Stout for conduct while Stout served as *legal counsel* to Telefind, contending that the investors were damaged by the implementation of this *legal* strategy. Gerling Aff. Ex. B at ¶ 96; Ex. C at ¶ 104. Specifically, Count I of both complaints seek damages because:

> in providing … *legal* advice, Stout traded upon his relationship of trust and confidence with Andy Andros and the Richards Investors. Stout and his Antonelli partners breached that relationship of trust and confidence when they put their own interests above those of [other investors in Telefind].

Id. These allegations of a purported attorney-client relationship and rendering of legal advice clearly are precisely the kind of allegations for which the Antonelli law firm and Stout are insured for under the MLM policy. Unquestionably, then, these allegations " … would, if proved, fall within the risk covered by the [MLM] policy " and MLM must afford a defense to its insureds. *See Capitol,* 536 F. Supp. 2d at 640 ("if *any* allegations

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6 Again, the Antonelli law firm and Stout deny these allegations.

[in the complaint] may potentially be covered by the policy, the insurer has a duty to defend") (emphasis added).

Significantly, the fact that there may be other allegations that might not be covered under the MLM policy is of no consequence. Virginia law is settled and requires that if there are *any* or even a *single* allegation that would be covered under the MLM policy for which there could be a judgment against the Antonelli law firm and Stout, then MLM must provide a defense. *See Mapp, supra; Fuisz, supra; Parker, supra.* Count I in each of the second and third amended complaints is exactly that. "And that is the start and end of the inquiry." *See* Gerling Aff. Ex. A at 10. It follows that MLM must defend the Antonelli law firm and Stout.

2. MLM Conceded That It Must Defend

MLM itself has acknowledged on repeated occasions during the course of the instant coverage litigation that the second amended complaint contains allegations that, if true, would be covered under its policy. In addition to its concessions before the Fourth Circuit, MLM has conceded throughout this very litigation that the second amended complaint contains allegations of purported "legal services" and of purported attorney misfeasance. *See* Gerling Aff. Ex. K at 6 ("... the pleadings' reference to the provision of legal advice"). Similarly, in the course of developing its late notice argument, which does not hold up under Virginia law, MLM also conceded that the "original and first amended complaints put Stout on notice of a claim to which the Policy was potentially applicable in that those pleadings made the same basic assertion of reliance by the plaintiffs therein on the legal advice given by Stout." Gerling Aff. Ex. K at 7. If that were true, then clearly MLM cannot credibly contend that the various iterations of the complaints do not contain any allegations covered by its policy.

Similarly, before MLM commenced the instant coverage litigation, it admitted in its reservation of rights letter that it would provide the Antonelli law firm and Stout with a defense for the underlying *Ferguson* matter. *See* Gerling Aff. Ex. F at 1 ("[w]e will provide Mr. Stout and the law firm with a defense to the [underlying action] ...."). MLM again referenced that concession in its brief in Opposition to Defendants' Motion to Dismiss stating that it "advised that it would provide a defense subject to the reservation of rights set forth [in its reservation of rights letters]." Gerling Aff. Ex. K at 14, footnote 1.[7] As such, MLM cannot be heard to contend that the *Ferguson* action does not trigger its duty to defend obligation.

C. MLM's Coverage Defenses Based On Its Policy Exclusions Fail

1. Fraud Exclusion

Despite its repeated admissions that the second amended complaint contains sufficient allegations to invoke its duty to defend obligation, MLM nonetheless maintains that it its policy's fraud exclusion bars coverage altogether. See Gerling Aff. Ex. H at 26. That is wrong. The fact that the fraud claim is no longer a part of the *Ferguson* action is fatal to this defense. *See* Gerling Aff. Ex. D. Even if that claim had not been dismissed, MLM's reliance on this exclusion fails because the fraud claim was only one of several other claims asserted by the plaintiffs against the Antonelli law firm and Stout. Virginia law is clear: There need only be a single claim on which there could be any judgment

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7 Even though MLM has admitted on numerous occasions that it would defend the Antonelli law firm and Stout with regard the *Ferguson* action, it has yet to pay anything towards either insured's defense.

against the Antonelli law firm or Stout in order for MLM's duty to defend to exist. *See, e.g., Captiol, supra; Fuisz, supra* ("where both covered and excluded acts are alleged, the duty to defend attaches"). Perhaps MLM's reliance on the fraud exclusion would have proven useful with regard to the duty to indemnify analysis had it been the case that fraud was the sole basis for a judgment in the *Ferguson* action against the Insureds. But this exclusion is of no consequence with regard to the duty to defend analysis given the other claims against the Antonelli law firm and Stout for breach of fiduciary duty that are potentially covered under the MLM policy.[8] *See* Gerling Aff. Ex. B at ¶ 96; Ex. C at ¶ 104.

Nonetheless, this contradiction does illustrate the rationale behind the "eight corners rule" under Virginia law, which requires the insurer to defend its insured if there is a *single* covered allegation in the complaint. As such, MLM's reliance on the fraud exclusion fails.

2. The Business Enterprise Exclusion Is Equally Inapposite

MLM's invocation of Exclusion 3 does not protect it either. Exclusion 3 applies only to claims arising out of professional services rendered in connection with any business enterprise "owned in whole or in part," "managed" or "controlled directly or indirectly" by an insured. Exclusion 3 provides:

> any CLAIM arising out of PROFESSIONAL SERVICES rendered by any INSURED in connection with any business enterprise: (a) owned in whole or part; (b)

[8] In addition, MLM would have needed to prove the existence of fraud in order to rely on this exclusion to negate its indemnity obligation. *See Am. Online, supra* (the burden is on the carrier to prove that exclusion bars coverage). That is not, however, the inquiry with regard to the duty to defend analysis.

> controlled directly or indirectly; or (c) managed, [b]y INSURED, and where the claimed DAMAGES resulted from conflicts of interest with the interest of any client or former client or with the interest of any person claiming an interest in the same or related business or enterprise.

See Gerling Aff. Ex. E (Form MLM-2003 (4-05) (p. 3 of 8)).

In order for MLM to carry its burden that this exclusion precludes coverage altogether for the Antonelli law firm and Stout, it would need to show that the allegations of the underlying complaint assert that the Antonelli law firm and Stout "(a) owned in whole or part; (b) controlled directly or indirectly; or (c) managed," Telefind. Yet, there are no such allegations.

The *Ferguson* plaintiffs merely allege that the Antonelli law firm and Stout were mere "investors" in Telefind and purportedly provided legal advice to certain of its investors. *See* Gerling Aff. Ex. B at ¶ 29; Ex. C at ¶ 32. There is no allegation concerning the form that investment may have taken and no allegation that it constituted any type of ownership interest. Nor is there any allegation that either the Antonelli law firm or Stout controlled or managed Telefind's operations. As such, the complaint fails to allege any of the necessary prerequisites for this exclusion to apply. *See Bohreer*, 475 F. Supp. 2d at 584 (the "Exclusive Pleading Rule" requires that courts determine the insurance company's duty to defend "solely by the claims asserted in the pleadings."); *see also Am. Guar. & Liab. Inc. Co. v. Moskowitz*, 58 A.D.3d 426, 870 N.Y.S. 2d 307 (2009) (attorney errors and omissions coverage case in which the court rejected the insurer's assertion that because the attorney was also an investor in the company that rendered the attorney an officer, director, or employee of company in connection with the business enterprise exclusion). It follows that MLM's reliance on this exclusion fails to negate its defense obligation.

3. The Specific Entity Exclusion Refers Exclusively to NTP, Inc. And MLM's Reliance on this Exclusion Fails

The express title of the endorsement — the "Specific Entity Exclusion Endorsement" — demonstrates that it only applies to the "specific entity" listed in the endorsement. *See* Gerling Aff. Ex. E at Policy Form MLM-48 (7/03). Here, that entity is NTP, Incorporated. The endorsement also expressly provides that coverage is excluded for "any claim resulting from any act, error or omission arising out of rendering or failing to render professional services *to* or *on behalf of* NTP." *Id.* However, the *Ferguson* plaintiffs' claims arise out of professional services purportedly rendered to Telefind, *not* NTP Inc. Indeed, NTP, Inc. was not even formed until 1992, well after the advice on which the underlying allegations concerning professional services rendered to Telefind are based. *See* Gerling Aff. Ex. B at ¶ 68; Ex. C at ¶ 71. Had it been the case in the *Ferguson* matter that NTP were suing the Antonelli law firm or Stout, then this endorsement might preclude coverage for such claims made by NTP, Inc. But NTP, Inc. has made no such claim. As such, this exclusionary endorsement has no applicability here. It follows that MLM's reliance on this exclusion also fails to negate its defense obligation.

VI. CONCLUSION

Based on the foregoing, the Antonelli law firm and Stout are entitled to summary judgment in their favor declaring that MLM has a duty to defend them in connection with the *Ferguson* action and that they shall be reimbursed for their defense costs that they have already expended in their defense of the *Ferguson* action.

Respectfully submitted,

Dated: April 9, 2010

________/s/____________

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of April 2010, I will cause to be filed with the Clerk of the Court who in turn will electronically file the signed Consent Order using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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